No. 20,592

United States Court of Appeals

For the Ninth Circuit

ANIEL A. ROBIDA,
Petitioner,

vs.

OMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

THE PRINCIPAL CONTROVERSY ON THIS APPEAL IS WHETHER THE DECISION OF THE TAX COURT SHOULD BE REVERSED AND REMANDED FOR NEW TRIAL

OR

WHETHER JUDGMENT SHOULD BE ENTERED FOR ROBIDA

1. The Commissioner Admits No Fair Trial

The Commissioner of Internal Revenue admits that there was no fair trial because the Government had access to Robida's records and not only failed to produce them but failed to make them available to Robida (see Respondent's Motion to Remand—Respondent's Brief 41-43).

2. The Commissioner Now Offers to Make Only a Part of Mr. Robida's Records Available

The CIR in his Motion to Remand hopes to cure the injustice by making *part* of Robida's records available to him (see Ciranni's Affidavit—Respondent's Brief 47-48). (Some copies; some originals; all unauthenticated. [See Respondent's intergovernmental memoranda, Respondent's Brief 49-54].)

(Compare Robida's Affidavit in Appendix B of this Brief, detailing his records, with intergovernmental memoranda (Respondent's Brief 49-54) and Ciranni's Affidavit (Respondent's Brief 47-48) showing only part of records now being offered by Government.)

3. The Question Is Whether the Government Can Force a New Trial on Just the Records It Chooses

The main controversy boils down to the issue of whether a fair trial is now possible. The impossibility of a fair trial is shown by Robida's allegations in his Affidavit in support of his Motion for Judgment (Appendix B) wherein he shows the nature and extent of seized records and limited access accorded him, and the failure of the Government to controvert those allegations in any effective way. It should be noted that the governmental correspondence (Respondent's Brief 49-54) confirms Robida's allegations that the Government has access to his records. It should also be noted that Ciranni's Affidavit (Respondent's Brief 47-48) does not in any way deny Robida's description of the limited access that was afforded him of the photostats of the five notebooks.

THE SECONDARY CONTROVERSY IS WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT ENTERING JUDGMENT FOR ROBIDA

.. The CIR Failed to Follow Mandatory Code Procedure in Making Jeopardy Assessment and Deficiency Determination

a) Code Requirements for Notices

The statutes clearly distinguish between deficiency procedures under Int. Rev. Code §6211 through §6216, where assessments and collections necessarily follow a determination of deficiency, and a jeopardy assessment under Int. Rev. Code §6861 through §6864, where both assessments and collections may precede a notice of deficiency or a determination by the Tax Court.

These safeguards include Int. Rev. Code §6303(a)[1] and §6861(a),[2] requiring a notice of demand for payment addressed to the taxpayer for payments of amounts assessed *before the Commissioner can levy*

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[1]§6303(a) reads:

"(a) General Rule.—Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and *demanding payment thereof*. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address." (Emphasis added)

[2]§6861(a) reads:

"(a) Authority for Making.—If the Secretary or his delegate believe that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and *demand* shall be made by the Secretary or his delegate for *the payment* thereof." (Emphasis added)

and collect the amounts assessed, and §6861(b)[3] requiring a notice of deficiency under Int. Rev. Code §6212(a).[4]

Two notices are clearly required under the Code, as was held in *United States v. Ball,* 326 F.2d 898. *Ball* held that the failure to show notice was a jurisdictional defect and "not capable of cure by appellant's failure to raise and present it squarely to the lower court."

(b) Constitutional Need for Notices

Because of the nearly absolute discretion given to the Commissioner in making jeopardy assessments, Congress has provided various safeguards to protect the taxpayer from what could otherwise result in a deprivation "of life, liberty, or property, without due process of law" in violation of the Fifth Amendment to the Constitution.

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[3]§6861(b) reads:

"(b) Deficiency Letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment."

[4]§6212(a) reads:

"(a) In General.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail."

(c) Notices Were Not Given

The Commissioner made no showing of having mailed the taxpayer a demand for payment of amounts assessed. Instead, the records clearly show that collection by levy of amounts assessed was started by the Commissioner August 29, 1962, before mailing to the taxpayer a notice of deficiency (1-R. 148-169) on September 18, 1962 (1-R. 44). A demand for payment is necessary if the taxpayer is to be allowed his rights under Int. Rev. Code Section 6863 on stay of collection of jeopardy assessments. As amounts assessed were collected by the Commissioner before the mailing of the notice of deficiency, and no notice of demand for payment was ever given, the taxpayer was effectively denied his right to file a bond to stay collection.

For this reason, as well as other reasons, the Tax Court should have set aside jeopardy assessments and ordered the return of all amounts assessed to the taxpayer. As stated by the Federal Court in *Darnell v. Tomlinson,* 220 F.2d 894, a jeopardy assessments procedure is an exception to the normally accepted method of assessment and collection of taxes and it should never be used either as additional penalty or in any other improper manner.

2. **The CIR Got Around the Statute of Limitations by Use of False Fraud Charges**

(a) Jeopardy and Deficiency Were Based on Fraud

Both the jeopardy assessment and deficiency determination of August 14, 1962, were based on failure to

file (I-R. 43-45)[5] which was the ground for fraud (II-R. 17, ll. 10-13). The years 1956, 1957, 1958 were *then* outlawed by Int. Rev. Code §6501(a).

(b) Admission of No Fraud Was an Admission of No Jeopardy

The Commissioner's admission of abandonment of the fraud charge on October 5, 1964, was tantamount to an admission that no jeopardy and no deficiency existed; the CIR cannot claim inadequacy of records.

(c) Admission of No Jeopardy Amounted to Abatement

The admission of no jeopardy and no deficiency constituted an abatement of the jeopardy assessment and claim of deficiency as a matter of law. The Commissioner in fact abated the jeopardy assessment and claim of deficiency before it was announced in Court on October 5, 1964. At the time he filed his answer denying that Petitioner had filed his tax returns, the Commissioner in fact knew that Petitioner had in fact filed his tax returns (II-R. 16-17).[6]

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[5]The September 18, 1962 notice of deficiency says:

"Assessment of the deficiencies and penalties has been made under the provisions of the internal revenue laws applicable to jeopardy assessments." (I-R. 43)

The accompanying statement says:

"In the absence of adequate records, your taxable income has been computed . . .".

"The 50 percent penalty shown herein has been asserted under the provisions of section 6653(b) of the Internal Revenue Code of 1954." (I-R. 44)

Page 2 of the statement (I-R. 45) says:

"Since no return was filed for the taxable year 1956, your taxable income has been determined as follows: . . ."

The statement makes the same claim of no return filed for each of the affected years (I-R. 44, 51, 54, 57, 60).

[6]At the trial Mr. Robida inadvertently referred to a "time in November". The letter in question was actually dated December 19, 1962. It is attached hereto as part of Appendix B, page

(d) Statute of Limitations Had Run on Years 1956-1960 When Government Announced Abandonment of Jeopardy Grounds

On October 5, 1964, when the CIR *announced* abandonment of all of his grounds for jeopardy assessment and deficiency determination, the three year statute of limitations had then run on all of the affected years (1956-1961) except the year 1961, the return for which was filed in 1962.

(e) 1961 Is Barred by Statute Now.

It was then open to the Commissioner to make a new deficiency determination for 1961, but he failed to do so. All of the affected years are now barred by §6501(a).

3. The Net Worth Method Was Not Open to the Commissioner

The Commissioner correctly states (Brief page 15) that he is justified in using the net worth method where a taxpayer's records are non-existent or where they are considered incomplete, inaccurate, or in some manner unsatisfactory. Of course, that route is not open to the government where the government has access to the taxpayer's records, and the taxpayer does not and the government, as here, either fails to produce the records or to make them available to the taxpayer so that he can produce them.

4. Net Worth Was Not Proved

The government did not produce any independent evidence as to opening net worth. The stipulation as

xxvi. It is to be noted that the letter incorrectly advises Mr. Robida that "This office cannot set aside the assessment, nor entertain a protest . . ." but correctly advises him that the matter is within the jurisdiction of the Tax Court.

to opening net worth claimed on page 20 of the Commissioner's Brief is non-existent. The government had the burden of proving net worth because, among other reasons, the government had access to Robida's records and Robida did not. The stipulation upon which the government claims to rely is in fact a disclaimer of any liability for the years as to which the stipulation is said to exist (I-R. 36).

THE TAX COURT HAD AUTHORITY TO DETERMINE ALL AMOUNTS ASSESSED AND TO RECOGNIZE AN ABATEMENT OF THE JEOPARDY ASSESSMENT

The statutory scheme clearly gives the Tax Court authority to redetermine the amounts assessed by way of jeopardy assessment. This power of the Tax Court is undoubtedly required by the Fifth Amendment to the Constitution and was given to the Tax Court by Congress in furtherance of constitutional requirements.

1. Assessment After Notice of Deficiency

Under Int. Rev. Code Section 6404(b),

> "no claim for abatement shall be filed by a taxpayer in respect of an assessment of any tax imposed under subtitle A or B."

Where assessment follows a notice of deficiency, sufficient judicial review of administrative determination is provided for in either the Tax Court or, if the taxpayer pays the tax, in the Court of Claims or a Federal District Court.

2. Assessment and Collection Before Court Review

However, in a jeopardy assessment before a decision of a Tax Court, the Tax Court must have broader jurisdiction than in its jurisdiction over an ordinary petition to redetermine a deficiency; otherwise, judicial review would not be effectively provided for on administrative actions. It is undoubtedly for this reason and in respect of constitutional government that Congress in enacting Int. Rev. Code Section 6861(c) gives the Tax Court

> ". . . jurisdiction to redetermine the entire amount of the deficiency and of *all amounts assessed* at the same time in connection therewith." (Emphasis added)

Where a jeopardy assessment is made before the decision of the Tax Court, a limited power in the Tax Court only to redetermine the deficiency would be meaningless since the Court could take no action to abate, or to set aside in part or in whole, the actual assessment. Where collection of the amounts assessed has preceded a Tax Court decision, the taxpayer would have no right to a refund of amounts assessed and collected unless he could sue for a refund.

The statutory scheme is clear: Where assessment but *not* collection precedes a Tax Court decision, the Tax Court has jurisdiction to redetermine the deficiency and amounts assessed; and where collection of amounts assessed *precede* the Tax Court decision, the Tax Court has authority *to order the return of all* amounts collected, by either a cash refund or by credit.

3. A Suit for Refund Is Not Necessary

Under Int. Rev. Code Section 6861(f), it is clear that a suit for refund is not necessary since this section provides:

> "If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in Section 6402, without the filing of claim therefor."

The intent of Congress is clear: The Tax Court has jurisdiction to finally dispose of all matters relevant to a jeopardy assessment where collection of amounts assessed precede the Tax Court decision.

THE COMMISSIONER'S ARGUMENT ON DENIAL OF EXEMPTION UNDER INTERNAL REVENUE CODE SECTION 911 IS NOT GERMANE TO THE ISSUES. HIS POSITION FALLS BECAUSE OF THE TRUE ISSUE IN THE CASE: UNFAIR TRIAL; BURDEN OF PROOF; STATUTE OF LIMITATIONS

Respondent's Brief is not responsive to the issues raised in either Appellant's Opening Brief or in his Motion for Judgment. The Commissioner's argument on §911 is one example, and for that reason will be treated more fully in Appendix A to this Brief.

All issues in this case depend upon the controversy as to fairness.

1. Failure of IRC to Produce Records Amounted to an Admission of Correctness of Returns

The Commissioner's refusal to produce Robida's records and his denial of those records to Robida not

only cast the burden of proof as to all issues upon the Commissioner, including any issue as to the operation and effect of Int. Rev. Code §911, but also prevented and still prevent Robida from making any effective showing in support of his income tax reports as filed. The government's failure in this regard is tantamount to an admission that Robida's income tax returns were correct as filed. That correctness should now be recognized by the Court.

2. Attempted Disallowance of §911 Exemption Was Based on Fraud

Since the government's deficiency determinations and jeopardy assessments were both made on the grounds of failure to file, fraud and inadequacy of records and since none of those grounds are now available to the Commissioner no claim of the Commissioner based on those grounds, including any attempted disallowance of exemption under §911 is now available to the Commissioner.

3. After CIR Abated the Jeopardy Assessment by Abandoning the Ground of Fraud, the Three Year Statute Came Into Play

Under Code Section 6861(g) after an abatement of a jeopardy assessment the Statute of Limitations must be calculated as though there were no jeopardy assessment. The three year Statute of Limitations provided by Int. Rev. Code §6501(a) then applies. The Commissioner's attempted disallowance of exemption under §911 as well as all of the other of Commissioner's contentions therefore fall because of the operation of Section 6501(a). The Commissioner's argu-

ment for the operation of the six year period provided by Int. Rev. Code §6501(e) is no more valid than any other claim of the Commissioner. §6501(e) can only operate if the taxpayer omits from his gross income an amount in excess of 25% of the amount of gross income stated in the return. The Government cannot now claim this 25% amount because it was also based upon failure to file, fraud and inadequacy of records.

It must be emphasized, however, as pointed out in Petitioner's Opening Brief, page 9, that IRC §6501(e)(iii) provides that in determining the amount omitted, there shall not be taken into account any amount disclosed in the return or in a statement attached to the return.

In claiming exemptions under IRC §911, Mr. Robida disclosed the sums which the Commissioner now seeks to disallow as exempt. (I-R. 68, 74, 81, 86, 93, 98, 103).

THE COMMISSIONER HAS IN EFFECT CONCEDED MR. ROBIDA'S POSITION ON THE MAIN CONTROVERSIES IN THIS CASE

1. The Commissioner Found on or Before December 19, 1962, That Jeopardy Did Not Exist and That There Was No Ground for Deficiency Determination. At That Time He Abated the Assessment Despite His Claim to the Contrary

(a) After IRC Finds No Jeopardy Exists, Section 6861(g) of the Internal Revenue Code Provides That Period of Limitations Be Determined as If No Jeopardy Assessment Was Made

"(g) Abatement if Jeopardy does not Exist. —The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy

does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The *period of limitation* on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, *shall be determined as if the jeopardy assessment so abated had not been made,* except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated." (Emphasis added)

(b) IRC Found Jeopardy Did Not Exist

When, on December 19, 1962, the Commissioner wrote "The income tax returns to which you refer in your letter, have been located" (Appendix B, page xxvi), he then found that jeopardy did not exist within the meaning of Int. Rev. Code §6861(g).

(c) IRC Continued to Assert the False Fraud Claim

Thereafter, in his answer and up to the time of trial, the Commissioner clung to his false claim of fraud, thereby gaining an advantage with respect to the statute of limitations to which he was not entitled. Since his entire position was based on this claim of fraud, the Commissioner by steadfastly maintaining it also willfully and wrongfully refused to refund the monies which he had seized and refused to admit the abatement to which Mr. Robida was then entitled.

(d) IRC Cannot Exercise Discretion to Deprive Taxpayer of Statutory Rights

Any exercise of discretion granted by law, whether exercised by the courts or by some other branch or department of the Government, must not be done in such a way as to deprive the taxpayer of statutory protections conferred by Congress, or as to deprive him of due process of law under the Fifth Amendment.

Section 6861(g) recognizes that the Commissioner's discretion in determining when to abate an assessment cannot be done in such a way as to deprive the taxpayer of the benefit of the statute of limitations.

The words "if he finds that jeopardy does not exist" cannot be construed to mean that the Commissioner can both find and not find, at the same time and with relation to the same matter, so as to deprive the taxpayer of his rights under the Code.

When the Commissioner found that the grounds for jeopardy assessment (failure to file, which was the basis of fraud) did not exist (December 19, 1962, letter, Appendix B, page xxvi) he could not at the same time hold the position that jeopardy did exist and thereby deprive Mr. Robida of the benefits of the statute of limitations.

The provision of that section requiring application of a different period of limitations in the event of an abatement clearly shows that the discretion as to abatement must be exercised with regard to statutory protections. If by use of assessment procedures

grounded on fraud the Commissioner avoids the ordinary three year period of limitations prescribed by §6501(a), thus depriving the taxpayer of the protection of that statute, and then finds that there was no fraud and hence no ground for the assessment, the Commissioner must, in order to give the taxpayer the benefits which Congress clearly intended, recognize an abatement. Otherwise he would have the power to thwart the intent of Congress by adopting two inconsistent positions at the same time and on the same subject, thus working an injustice. That is exactly what the Commissioner has done in this case by first making and then maintaining a false claim of fraud.

The Commissioner could have used statutory procedures to file a new notice of deficiency so as to protect the Government on the statute of limitations. He did not use such procedures but instead chose to maintain a false position to deprive the taxpayer of statutory protections. The Commissioner must now accept the consequences of that choice.

2. Respondent Admits Access to Robida's Records

In a footnote on page 15 of his Brief, the Commissioner makes his answer to Petitioner's Opening Brief. The Commissioner attempts to dispose of the burden of proof-records issue in the last sentence of that footnote by saying that the taxpayer did not choose to make a formal demand on the Commissioner for "these photostats". Nowhere does the Commissioner deny or seriously attempt to traverse the allegations concerning his records contained in Mr.

Robida's affidavit in support of his Motion for Judgment although it was certainly within the power of the Government to do so through Mr. Dody of OSI or Mr. Hayes of CID (see page 53 of Commissioner's Brief), or through any of the various personnel of the Office of International Operations, the Revenue Service representative in Bonn or various German officials with whom they dealt. What they were in a position to deny and did not deny should be taken as true.

3. Respondent Admits Withholding Records From Robida

The affidavit of Ciranni submitted by the Commissioner in opposition to Mr. Robida's affidavit and Motion for Judgment in no way contradicts Mr. Robida's statement that the records that were shown to him by Mr. Ciranni were incomplete; that he was not permitted to handle them for any appreciable length of time; that Mr. Ciranni indicated that the Government might have other records but could not show them to Mr. Robida; that Internal Revenue Service agents would neither confirm nor deny that they had additional records in Washington or elsewhere; that Mr. Robida was only allowed a brief inspection of certain photostatic copies at the Tax Court hearing in San Francisco.

What the Government is in essence doing is giving Mr. Robida momentary glimpses of what are claimed to be photostats of fragmentary records and then damming Mr. Robida because he refuses to accept them as either complete or correct.

The Government's attempted disclaimer in that footnote of any responsibility for Robida's records will not wash. The mere fact that the Government now claims to have some photostats and some originals of Robida's records shows that they had access. The interdepartmental letter of August 15, 1963 (page 49 of Respondent's Brief), shows that the Government has long had access to the records. The letter of May 3, 1966 (page 53 of Respondent's Brief) shows that originals were no particular problem to the Government.

4. The Government Has Guilty Knowledge of the Seizure of Robida's Records

Mr. Ciranni's remark to the Court on page 56 of Vol. II of the Reporter's Transcript that he knows the answer to Robida's mistreatment in Germany confirms Robida's repeated claim throughout the trial and his claim on page 2 of his affidavit that his records were seized by the United States Government and the German Police acting in concert. It will not do for the Commissioner now to claim the benefits but disown the burden.

In that footnote the Commissioner makes an odd attempt at exculpation by saying that he did not use any of the photostats of the taxpayer's records held by the German Police in computing the net worth statement since the record seizure came after the deficiency notice. What that has to do with the case is hard to see, but it does show that the Commissioner is hard put to find an argument. He seizes upon the circumstance that on page 3 of his Opening Brief Mr.

Robida's attorney indicates that the Germans got the records from the Internal Revenue Service. Of course, Mr. Robida's claim right along has been as stated on page 2 of his affidavit that his records were seized by the United States Government and German Police. Perhaps Mr. Dody of the OSI or Mr. Hayes of the CID would know something about that.

The Commissioner's idea of fairness apparently is encompassed in that paragraph of the footnote appearing on page 16 of his Brief wherein he indicates that in the "interest of fairness, since the taxpayer was not represented by counsel in the Tax Court, on May 13, 1966, counsel for the Commissioner furnished the taxpayer's counsel with a Xerox copy of the photostats of the taxpayer's five diaries . . ." and offered to remand the case and allow Robida to use the copies of those five diaries. This magnanimity is somewhat lessened by the Commissioner's observation in the last sentence of the first paragraph of that footnote where he indicates that the taxpayer did not choose to make a formal demand on the Commissioner for "these photostats". One wonders what good such a demand would have been to Robida when he indicates on page 5 of his affidavit that he was not allowed to see his records although he demanded that they be returned to him many, many times. Robida did make a formal demand (See I-R. 36).

5. The Commissioner Wrongfully Made the Statute of Limitations Covering Fraud Appear to Be the Controlling Statute

The Commissioner's argument with reference to records is akin to his argument with reference to the

Statute of Limitations. Up to and including the time of trial, the Commissioner relied upon fraud (Int. Rev. Code §6653(b)) for which Int. Rev. Code §6501(c)(3) allows an assessment at any time. So long as the government continued to persist in its allegations of fraud, knowing that the basis for fraud was false, §6501(c)(3) appeared to be the applicable statute. But when the Commissioner at time of trial for the first time announced his abandonment of fraud so that §6501(c)(3) was clearly no longer applicable and §6501(a) became the controlling statute, Mr. Robida then being deprived of his records and the Court disclaiming any jurisdiction to deal with the wrongful assessment, Mr. Robida was hardly in a position to go about amending pleadings.

Since the government can no longer maintain its false position of fraud; and its deficiency determination and jeopardy assessment of August 14, 1962, have been abandoned, it is now open to Mr. Robida for the first time on this appeal to apprise the Court that any new assessment or deficiency determination are barred by Int. Rev. Code §6501(a).

CONCLUSION

Whatever the reasons the government might have had for its treatment of Mr. Robida and no matter how sincere Mr. Ciranni or any other of the Commissioner's counsel or agents may have been throughout the history of this case, it now seems abundantly evident that fairness is a commodity which can now

be extended to Robida only by a Judgment and Order of This Honorable Court returning the moneys which were seized from him under cover of fraud, together with interest and costs as provided by law.

Dated, San Francisco, California,
November 1, 1966.

Respectfully submitted,
JOHN R. SWENDSEN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN R. SWENDSEN,
Attorney for Petitioner.

(Appendices Follow)

Appendices.

Appendix A

PETITIONER'S REPLY TO THOSE PORTIONS OF RESPONDENT'S BRIEF WHICH WERE NON-RESPONSIVE TO THE ISSUES ON THIS APPEAL

A. Respondent Misstates the Issue

Respondent says (Brief 14) that the issue is whether there was evidence to support the Tax Court's Judgment.

Whether there was evidence to sustain the Tax Court findings is not the issue. No matter how much evidence was produced, the Tax Court's judgment cannot stand for the reason that the Government deprived Mr. Robida of his records and he had no means to counter anything the Government might have done or any evidence it might have adduced. The issue is remanding or judgment for Robida.

Outside of the net worth statement itself, the only evidence introduced by the Government was the testimony of Mr. Shamberger, whose testimony begins at page 101 of the Reporter's Transcript. Nowhere in that testimony is there any attempt to establish an opening net worth as required by *U. S. v. Eley,* 11 AFTR 2d 711. When Mr. Robida asked Mr. Shamberger whether he could say if all the account balances are accurate at the time the sheet was made, Mr. Ciramni objected and the Court ruled that Shamberger did not have to answer because the question was beyond the scope of direct examination. (II-R. 104) That appears to be the extent of the foundation laid for the net worth statement.

B. Respondent Erroneously Assumes That He Was Entitled to a Presumption of Correctness in His Jeopardy Assessment and Tax Determination

On page 19 of his Brief, the Commissioner contends that the approval by the Tax Court of his determination of opening net worth has not been shown to be clearly erroneous and should be sustained. Throughout his Brief, the Commissioner appears to rely upon a presumption of correctness. By assuming that presumption, the Commissioner attempts to impose upon Petitioner the burden of overcoming it. The Commissioner has not cited one statutory enactment, judicial decision, or even regulation of the Commissioner himself, to the effect that when the Commissioner has sole access to a taxpayer's records there is any entitlement to the presumption. The Commissioner has not cited and doubtless cannot cite any authority to counter *U. S. v. Heath,* 147 F.Suppl. 877, 51 AFTR 630 (affirmed 9th Circuit 1958 in 2 AFTR 5627, 260 F.2d 623), announcing the rule that the government's failure to produce the records it had access to carries a strong presumption that the records would be against the government's position.

Apparently relying upon a presumption that everything that the Commissioner does or says is correct, the Commissioner on page 20 of his Brief argues that the opening net worth for 1956 was proved by a stipulation for the closing net worth of 1955. There is no such stipulation in the record. The Commissioner cites *Cefalu v. Commissioner,* 276 F.2d 122 (CA 5th); *Shaw v. Commissioner,* 252 F.2d 681 (CA 6th); *United*

States v. Fenwick, 177 F.2d 488 (CA 7th) in support of his position.

In *Cefalu* as in the instant case the government's case was based upon fraud. In *Cefalu* the Court stated "there is no presumption of correctness attached to the Commissioner's findings on fraud".

Shaw is not in point. The stipulation made for purposes of that case was not in issue.

In *Fenwick,* an income tax evasion case, the Court held that the government has the burden of proof and that this burden never shifts to the defendant. In *Fenwick,* a judgment of conviction was reversed, the Court quoting from *Bryan v. United States,* 175 F.2d 223 (CCA 5th) wherein the Court said:

> "The net worth expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate."

The government certainly did not sustain any such burden in the Robida case.

In *Holland v. United States,* 348 U.S. 121, cited by Respondent on page 20 of his Brief to support its net worth calculation, Justice Clark in commenting on the net worth method stated:

> "One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy."

Robida was not in such a position.

C. Respondent's Claimed Stipulation as to Opening Net Worth Is Non-Existent

On page 20 of his Brief, the Commissioner cites II-R. 68, 73-74 and I-R. 36, 177 for the proposition that Mr. Robida stipulated to an opening net worth in 1956.

II-R. 68 contains nothing remotely resembling a stipulation. II-R. 73 to 74 amount to a question and answer quarrel between Mr. Robida and Mr. Lee of the government. There is no stipulation there.

In I-R. at page 36, there is a Request and Notice by Mr. Robida wherein he states that he made a prior settlement with the Government for the years ending with 1955 and made the settlement under protest, believing that he did not owe any tax and that it was understood in 1957 that his net worth statement was not complete. That is not a stipulation.

It is to be noted that in that Request and Notice on page 36, Mr. Robida requests that his records seized in Wiesbaden, Germany, be made available to him.

I-R. 177 does not contain anything that can be possibly considered a stipulation.

D. The Commissioner Had the Burden of Proving That Income Reported as Exempt Under Internal Revenue Code Section 911 Was Not Exempt. The Commissioner Failed to Sustain That Burden

Once again, the circumstance of Robida's records comes into play. Robida's records if made available to him would show not only where he was from time

to time, but from whom and how he derived his income. The government having access to those records and having failed to produce them failed in its burden of proof.

E. The Evidence Shows That Robida's Income Was Exempt

Both the Commissioner and the Tax Court assumed that monetary gains derived from the skillful manipulation of coin-operated machines in such a manner as to eliminate the element of chance constituted gambling income. However, Int. Rev. Code §4462 (a)(2) defines slot machines as an object that operates by "the application of chance". The machines manipulated by the Petitioner (Respondent's Brief 24; II-R. 52, 53, 61, 66) were not "slot machines" as defined in Int. Rev. Code §4462(a)(2) since the application of chance did not apply to them. Monetary gains made by Petitioner's ability to eliminate the application of chance were, therefore, not gambling gains under Revenue Ruling 55-171, 1955-1 Cum.Bull. 80, 87.

Throughout the trial both counsel for the Respondent and the Tax Court imply that there is something reprehensible about skillfully manipulating coin operated machines. Surely, the person who by skill is enabled to eliminate the application of chance is behaving in a more intelligent, rational and acceptable manner than the person who constantly loses his hard earned money.

The Petitioner did not gamble. His monetary gains, if taxable at all, must by the process of elimination

have constituted earned income under Int. Rev. Code §911. No one has ever been able to prove that Petitioner manipulated coin operated machines in other than a completely legal manner (II-R. 33). In fact, the Appellant put on a demonstration before a group of Air Force Generals that proved to them his ability was a legal one, and the demonstration resulted in the dropping of charges against Petitioner (II-R. 62). The fact that Petitioner made substantial earnings from coin operated machines and could prove to the satisfaction of very high ranking and responsible Air Force Officers that he did possess extraordinary skill in pulling the handle in such a manner as to hit a jackpot shows that Petitioner was not gambling. His monetary gains constitute earned income as would that of any other self-employed person.

Since Petitioner's monetary gains were not gambling income, they would not be taxable at all unless they are "earned income" under Int. Rev. Code §911. For Petitioner's monetary gains to be taxable, they must come under Int. Rev. Code §61 defining gross income. Thus, Respondent's argument (Reply Brief, page 25) proves too much. If an overly restrictive interpretation is given to "earned income", then Petitioner's monetary gains, which are clearly not gambling income, would not be earnings at all and thus not part of gross income under Int. Rev. Code §61. Petitioner, however, has always treated and considered that his monetary gains constitute income under Int. Rev. Code §61, which would then neces-

sarily be exempt as earned income under Int. Rev. Code §911.

F. Mr. Robida Was Never Given an Opportunity to File the Bond to Stay Jeopardy Assessment

At page 31 of his Brief, the Commissioner argues that institution of Tax Court proceedings and this appeal do not operate to stay the Commissioner from enforcing a jeopardy assessment in the absence of a bond.

Mr. Robida was never given a chance to file a bond. On August 29, 1962, by way of levy, the Government collected more than is now admittedly due (I-R. 147-169). It was not until September 18, 1962, that the IRS mailed a notice of deficiency to Robida at Wiesbaden, Germany (I-R. 43).

More important still is the circumstance that there is no showing that a notice of demand for payment was ever made upon Mr. Robida as required by Int. Rev. Code §6861(a). As pointed out elsewhere in this Brief, the requirement for a demand for payment is jurisdictional and without it the Government's case fails entirely.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

No. 20,592

DANIEL A. ROBIDA,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION IN OPPOSITION TO MOTION TO REMAND AND MOTION FOR FINAL JUDGMENT

Petitioner represents and moves as follows:

In Fairness to Petitioner, Respondent's Motion to Remand Should be Denied

In his Motion to Remand, Respondent indicates a willingness to be fair (paragraphs 5 and 6) to Mr. Robida, by making available "a Xeroxed copy of photostats" of certain diaries of Petitioner. As appears from Mr. Robida's Affidavit in support of this Motion, those records are incomplete and inadequate and can no longer constitute an evidentiary basis for any contention of either party.

The case can now be disposed of on matters of law, and this Court has adequate jurisdiction to do so, as appears more fully hereinafter. To remand under these circumstances would not be promotive of the ends of justice but would continue a history of unfairness which is now too long.

The Motion of the CIR Assumes That Issues of Fact Remain Upon Which Mr. Robida had a Burden of Proof

Respondent, in his Motion to Remand, assumes (p. 3) that the records which he now offers to make available would be used by Mr. Robida, the Petitioner, to prove his contentions at a further trial before the Tax Court.

That assumption is wrong on two counts. In the first place, as Petitioner points out in his Opening Brief (p. 10), the CIR at the time of trial abandoned all of the grounds upon which his Notice of Deficiency and Jeopardy Assessment was based. Any new theory he might then have advanced was subject to proof by the Commissioner. He failed in that and cannot now receive a new trial to correct his failure. He has not appealed.

Second, and more important, it appears that there was no issue before the Tax Court and nothing for it to do but render judgment in favor of Mr. Robida.

Since the Commissioner's Notice was based upon fraud, failure to file and inadequacy of records, and since all of those grounds were abandoned, he in effect abandoned his Deficiency Notice and Jeopardy Assess-

ment. As shown on RT 17, lines 12-13, the fraud allegation was based on failure to file. At the same time, the grounds of failure to file necessarily constituted the basis of the grounds of inadequacy of records. Moreover, the records must be assumed to be adequate since CIR had possession and control of them, but did not introduce them in evidence in order to show a basis for the net worth calculation.

There was nothing left for Mr. Robida to contest. No issue then remained before the Tax Court. There was no burden of proof to sustain.

After the CIR Abandoned his Deficiency Notice, the Tax Court had no Jurisdiction to Make Findings or to Render a Decision Other Than in Conformity with the Commissioner's Confession of Error

After the IRS gave its September 18, 1962 Notice of Deficiency and Jeopardy Assessment to Robida (CT 44), the Tax Court had jurisdiction under Internal Revenue Code §§7442 and 6213(a) to entertain his Petition for Redetermination. The language of §6213(a) is as follows:

> "(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the

deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

"Lack of jurisdiction of a federal court touching the subject matter of litigation cannot be ignored by a federal appellate court. So a judgment or order rendered without jurisdiction or authority *must ordinarily be reversed,* and an appellate court may of *its own motion reverse* such a judgment or order. This rule applies where the record does not affirmatively show jurisdiction; and it has been applied to lack of jurisdiction of the subject matter." 36 C.J.S. Fed. Ct. §301(15) and cases cited therein. (Emphasis added)

When the CIR abandoned the grounds upon which the Deficiency Notice and Jeopardy Assessment was made (failure to file, fraud, inadequacy of records—CT 45, 48, 51, 54, 57, 60), it abandoned the deficiency and the jeopardy assessment, and in effect abated the jeopardy assessment under §6861(g).

At that time the basis for the Tax Court's jurisdiction ceased to exist, except to render judgment in accordance with the abandonment and abatement by the CIR.

It is Now in Order for This Honorable Court to Render Final Judgment

"A judgment will ordinarily be reversed on a confession of error by appellee, respondent, or defendant in error." 36 C.J.S. Federal Courts §301(15), Citing *Thomas v. U. S.,* C.C.A. Miss. 96 F.2d 767.

"A judgment or decree on the merits in a cause wherein jurisdiction is not affirmatively shown on the record will be reversed by the court of appeals with instructions to dismiss the suit for want of jurisdiction and without prejudice, unless an amendment shall be made so as to exhibit a case within the jurisdiction." 36 C.J.S. Federal Courts §301(20) and cases cited therein.

In most cases, the reversal is made without considering the merits of the action. 36 C.J.S. Fed. Cts. §301(20). See *American Sugar Refining Co. v. Johnson* (Fla.) 60 F. 503, 9 CCA 110. Thus, where no jurisdiction is shown (and Respondent has failed to meet the burden of proof on jurisdiction), the appellate court "in such case will not, on reversing a judgment, remand the case for further proceedings, but will itself render final judgment of dismissal or nonsuit." 36 C.J.S. Fed. Cts. §301(20).

The Tax Court had Jurisdiction Under IRC §6861(c) not Only to Increase or Decrease the Amount of Deficiency, but also Abate the Assessment Completely and to Recognize the Fact of Abatement as a Matter of Law under IRC §6861(g)

IRC §6861(c) provides in pertinent part as follows:

> ". . . Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith."

The Tax Court apparently was under the impression that it had no such power as appears from the following (RT 16, lines 5-10):

> "The Court: I want you to understand that this Court has nothing to do with the jeopardy assessment. I have no authority to hear anything about a jeopardy assessment, no authority to raise the assessment or lower it or get rid of it.
>
> I cannot do a thing about that."

Mr. Robida was understandably confused as appears from the following (RT 16, line 11 to RT 17, line 13):

> "Mr. Robida: Well, your Honor, you see, it is very confusing to me.
>
> You take this as an example. They sent the notice, the statutory notice, based upon the fact, the allegation, that I had never filed any return for the past six years, and then they proceeded to assess a fraud penalty and a tax on a sum of—well, it comes to $77,000, and I pointed out in the Petition that I had filed returns for each of the

years with the District Director in Portsmouth, New Hampshire and paid the taxes that was due.

They turned around and answered and in their answer they said I still did not file any tax returns and I was trying to cheat the Government.

Well, the fact is that I did file returns, and even at the time in November when they wrote to me and said they were aware of the fact that I had filed the returns in November of 1962, and the answer came in February 1963 saying I had not filed returns.

The inconsistencies are very hard on me to understand what is going on.

The Court: How are you going to prove you filed those returns?

Mr. Robida: Well, the Respondent is willing to admit I filed them.

Mr. Ciranni: I have already told him we had found the returns. He can't get them into evidence, but I will get them into evidence. We have copies of them here. This was the basis of our fraud allegation."

IRC §6861(g) gives the Secretary or his delegate the power to abate an assessment if jeopardy does not exist. The abandonment of all grounds for jeopardy assessment was in effect a ruling by the CIR that jeopardy did not exist. Thus, the Tax Court should have exercised its power under §6861(c) to set aside the jeopardy assessment and to order the return of all funds obtained by way of levy under an assessment admitted by the CIR to be on no adequate grounds.

Wherefore, Petitioner moves this Honorable Court for its order

1. Denying Respondent's motion to remand;

2. Making final judgment in favor of Petitioner;

3. Directing Respondent to return to Petitioner all moneys and other property seized by Respondent by way of levy or otherwise, with interest and costs as provided by law;

4. Granting any other relief that may appear to be just.

Respectfully submitted,

John R. Swendsen
126 Post Street
San Francisco, California
Attorney for Petitioner
Daniel A. Robida

Dated: July 8, 1966.

In the United States Court of Appeals
for the Ninth Circuit

No. 20592

DANIEL A. ROBIDA,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION IN OPPOSITION TO MOTION TO REMAND AND IN SUPPORT OF MOTION FOR JUDGMENT

Daniel A. Robida, being first duly sworn, deposes and says:

I am the Petitioner above named. I am sure that, if my records had been made available to me at the commencement of these proceedings, they would have shown my income tax returns to be correct as filed. At this late stage of the proceedings, however, the disordered and incomplete state of my records, now in the control and possession of Respondent, would be of no use to me.

As will be made clear later on in this Affidavit, agents of the government conducted an extremely thorough and extensive investigation not only of my

records but of my personal and business backgrounds. I am convinced that the reason Respondent did not produce any of the fruits of that very intensive investigation is that the results were favorable to me and revealed nothing that would support Respondent's jeopardy assessment and notice of deficiency.

This investigation occurred after Respondent had charged me with fraud, which Respondent now claims was only based on failure to file income tax returns. (Now admitted to be false—RT 17)

The investigation obviously did not produce any evidence of fraud, and just as obviously did not produce anything which would show that my income tax liability was anything other than as reported on my returns, which are now admitted to have been filed and paid by me.

The photostats forwarded to my attorney, John R. Swendsen, by the attorneys for the Commissioner of Internal Revenue with forwarding letter dated May 13, 1966 (see Appendix B to Petitioner's Opening Brief) consist of Xerox copies of photostats of five notebooks, bound together with Acco fasteners. I am unable to say whether these photostats actually reflect my original records. The pages of these photostats appear to be out of order. Some of the pages in them I do not recognize as mine. These five bound photostatic copies do not constitute all of my original records and would be substantially useless to me in any court proceeding.

The records which I had and which were seized by the United States Government and the German Police

were sufficient to fill an ordinary grocery box. I had at least ten notebooks of the general kind indicated by the photostats sent to Mr. Swendsen on May 13th. I maintained four separate sets of notebooks, each containing different kinds or materials, as follows:

1. *Travel Books:* Containing names of places visited, with dates and names of individuals with whom I transacted business, including pupils whom I taught; names and addresses of persons I could rely upon; names and places of clubs I visited; other material that I cannot now remember.

2. *History or Diary:* Containing notations of incidents concerning myself and other persons that occurred on Army or other Government bases which indicated corruption in NCO clubs and the like.

3. *Auto Log:* Containing mileage traveled; automobile expenses and other expenses shared with other people in the course of traveling and obtaining lodging and the like.

4. *Income Records:* Containing notations of gross and net income from overseas and U.S. sources, plus a summary of expenses from the Auto Log.

All of these books together gave a complete picture of my income and financial transactions from approximately 1947 to 1962.

Other records which were seized consist of the following:

1. Letters to banks and insurance companies; money order stubs; cancelled checks; copies of bank drafts; acknowledgments of moneys owed to me but not paid.

2. Lists of family names with birth dates, marriages, etc.

3. Automobile, airplane and radio licenses; operators licenses; seamen's licenses; medical records, including records of inoculations necessary for travel.

4. Statements sworn to before American Consuls from various persons pertaining to moneys owed and moneys earned and the nature and origin of debts.

5. Photographs of people and places, including clubs where I earned money. The photographs contained notations of dates, places and other material.

At no time, after all of these records were seized, was I permitted to have them or inspect them, except for the momentary and cursory occasions when either German or American officials and agents would ask me whether certain records were mine. They did return my seamen's papers, however.

When I was incarcerated in Wiesbaden, Germany, my records were seized, but I was not present at the time.

In jail, on at least 20 occasions, I was questioned by both American and German officials and agents. They questioned me about all kinds of things, including my records, and did show me, but did not permit me to inspect, income tax records which I had just then mailed to my brother in the United States. They admitted to me at that time that they had taken that envelope and those records out of the mail. Those records sent to my brother were very important to my case because they contained orderly summaries, show-

ing that my income as reported and my tax as paid were correct.

On three separate occasions, while I was incarcerated at Wiesbaden, I was taken out of the jail and escorted by both German Police and U.S. military personnel (OSI personnel and CID personnel from the Army and the Air Force) to the U.S. Air Force Base at Wiesbaden and there I was questioned extensively about slot machines and my entire life. On the first occasion I saw a box full of papers which appeared to be mine. One of the American agents questioning me took a small notebook, which I recognized as mine, and placed it before me. He opened it to a particular page and said "What does this page mean?" When I went to reach for it, the agent made a gesture and said "Don't touch the book". I then said "Well, it's my book". The agent then said "Well, it belongs to the United States Government now and you will never see it again as long as you live". That was the last time that I saw the originals of any of my notebooks.

On the other two occasions when I was taken to the U.S. Air Force Base at Wiesbaden from the Wiesbaden jail, my records were present, but I was not allowed to see them, although I demanded that they be returned to me many, many times. On each of those occasions, the agents questioning me tried to get me to sign a statement to the effect that I was not under threat, intimidation or coercion. I told them that I would not sign any such statement because I was under threat, intimidation and coercion. On all three

occasions, both German and American officials were present. On at least one occasion, they had a tape recorder going, and on at least one of the occasions they had a typist there who typed the interrogation as it progressed.

On a fourth occasion, I was taken from the Wiesbaden jail, again escorted by substantially the same kind of personnel, and taken to the U.S. Army Base at Darmstadt where I was made to demonstrate before American Generals my skill in manipulating slot machines without any tools or devices whatsoever, so as to eliminate the element of chance.

I was never given any court hearing at any time, either before or after my release from jail.

After my return to the United States, I had several conferences with Internal Revenue Service personnel on Sutter Street in San Francisco. At some of those conferences I was shown some photostats and asked if they were my records. While they had a general appearance that would indicate that they might be my records, I could not positively identify them for a number of reasons. One reason was that they were all mixed up as to pages. Another reason was that I was not permitted to handle any of them for any appreciable length of time. A further reason was that some of the notations in those photostats were such that I could not identify them as being mine.

None of the records that I saw during those conferences were complete. Mr. Ciranni (who was present at some of these conferences) stated that the Govern-

ment might have other records of mine, but that he could not show them to me. He said that these other records might be in Washington. When I asked whether they had the originals, neither Mr. Ciranni nor any of the other Internal Revenue Service agents would say that they either had them or did not have them, and when I made further inquiries, they would neither confirm nor deny that they had additional records in Washington or elsewhere.

On the morning of the Tax Court hearing in San Francisco, Mr. Ciranni showed me what purported to be a great pile of my records, but he would only let me briefly inspect certain of the photostatic copies of notebooks.

My memory cannot now be refreshed as a result of the present state of my records and other papers that were seized by American and German agents. I could not now safely rely upon them in any court proceeding. I am convinced that my records are no longer reliable.

/s/ Daniel A. Robida
Daniel A. Robida

Subscribed and sworn to before me at San Francisco, California, this 8th day of July, 1966, by Daniel A. Robida.

(Seal)

Wilson Reid Ogg,
Notary Public, State of California,
Principal Office, Alameda County.

My commission expires March 24, 1968.

In the United States Court of Appeals
For the Ninth Circuit

No. 20,592

DANIEL A. ROBIDA,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SUPPLEMENTAL AFFIDAVIT OF DANIEL A. ROBIDA IN SUPPORT OF MOTION FOR JUDGMENT

State of California
County of San Francisco—ss.

Daniel A. Robida, being first duly sworn, deposes and says:

I am the Petitioner above named.

After the Internal Revenue Service advised me that they were charging me with fraud on the grounds that I had not filed my income tax returns for the years 1956 through 1961, I wrote them a letter dated December 6, 1962, advising when and where I filed the returns for those years.

I received a reply dated December 19, 1962, from the San Francisco District Director of the Internal Revenue Service acknowledging that the returns had been located. A photostatic copy of said letter is attached hereto and made a part hereof. Said photostat is a true copy of the original in every way except for the marginal notations which are in my own handwriting.

/s/ Daniel A. Robida
Daniel A. Robida

Subscribed and sworn to before me at San Francisco, California, this 20th day of October, 1966, by Daniel A. Robida.

(Seal) /s/ Wilson Reid Ogg
Notary Public, State of California
My Commission Expires March 24, 1968

Read, Use, Remember!!

Letterhead of
U.S. Treasury Department
Internal Revenue Service
District Director
San Francisco 2, California
100 McAllister Street
Dec. 19, 1962

In Reply Refer to
A:R:150D:JCB:Room 1312

Mr. Daniel A. Robida
c/o Kurhotel Savabini
Paulinenstrasse 4
Wiesbaden, Germany

Dear Mr. Robida:

This is in reply to your letter dated December 6, 1962, in which you acknowledge receipt of our letter dated September 18, 1962. Our letter advised you that one hundred and fifty days are permitted for the filing of a petition to the Tax Court of the United States.

The income tax returns to which you refer in your letter, have been located. The tax reported on these returns would have a negligible effect on the tax, penalty and interest recited in our letter. This would not, in any case, have had the effect of setting aside the jeopardy assessment.

The provisions of the Internal Revenue Laws applicable to jeopardy assessment allow the taxpayer to protest by means of a petition to the Tax Court of the

United States. In your case, this must be done by February 18, 1963. The law does not provide for an extension of time for filing the petition. This office cannot set aside the assessment, nor entertain a protest, the matter being wholly within the jurisdiction of the Tax Court.

Enclosed for your convenience is an extra copy of the adjustments leading to the assessments made, which you requested. The original of this was furnished to you with our letter of September 18, 1962.

Very truly yours,
Claude F. Salter
Chief, Audit Division

Enclosure

30-Day Room 1312—DAR

IRS Answer was filed Feb. 20, 1963 this proves IRS lied when they stated I had not filed returns in their answer at least—DAR